Supreme Court, U.S.
FILED

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No. 951989 APR 17 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JORGE SOTO,

Petitioner,

v.

IRENA LEBEDEVA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS FOR REVIEW

1. Whether Va. Code Ann. § 8.01-329 unconstitutionally denied the Petitioner's due process rights because of the statute's failure to provide any safeguards to prevent the perpetration of fraud or abuse.

2. Whether Va. Code Ann. §8.01-329 unconstitutionally denied the Petitioner's due process rights because the statute contains no notification provision which is reasonably calculated to apprise the Petitioner of the pendency of an action.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the Default Judgment entered against him on September 9, 1994, based on Va. Code Ann. § 8.01-329.

The Supreme Court of Virginia denied Petitioner's Petition for Appeal on December 15, 1995. On January 19, 1996, the Supreme Court of Virginia denied Petitioner's Petition for Rehearing.

Jurisdiction of the Supreme Court of the United States is proper pursuant to Article III, Section 2, Clause 1 of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter involves a question of the Due Process Clause found in the Fourteenth Amendment of the United States Constitution, which holds, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

In direct conflict with the Fourteenth Amendment is Va. Code Ann. §8.01-329, which provides as follows:

§8.01-329. Service of process or notice; service on the secretary of commonwealth. -

A. When the exercise of personal

jurisdiction is authorized by this chapter, service of process or notice may be made . . . on the Secretary of the commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent for such person.

B. When service is to be made on the Secretary, the party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a non-resident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

When the person to be served is a resident, the signature of an attorney, party or agent of the person seeking service on such affidavit shall constitute a certificate by him that process has been delivered to the sheriff or to a disinterest person as permitted by § 8.01-293 for execution and, if the sheriff or disinterested person was unable to execute such service, that the person seeking service has made a bona fide attempt to determine the actual place of abode or location of the person to be served.

STATE PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE REVIEWED

The federal questions sought to be reviewed today were first raised in the Memorandum of Points and Authorities in Support of Motion to Set Aside Default Judgment, filed on May 16, 1995. Petitioner renewed the federal questions sought to be reviewed in the Defendant's Petition for Appeal to the Supreme Court of Virginia. Finally, Petitioner raised these issues in Petitioner's Petition for Rehearing filed in the Supreme Court of Virginia.

Pursuant to Supreme Court Rule 14.1(h), Petitioner has reproduced those portions of the records which set forth the specific constitutional arguments previously raised in the Appendix.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JORGE SOTO,

Petitioner,

v.

IRENA LEBEDEVA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On February 17, 1994, Counsel for Respondent filed a Motion for Judgment as a result of a motor vehicle accident which allegedly occurred on December 11, 1992 in Fairfax City, Virginia. On February 23, 1994, the Notice of Motion for Judgment was issued by the Circuit Court for Fairfax County. On March 7, 1994, Proof of Service was filed by Sheriff of the City of Alexandria, showing the Petitioner as "NOT FOUND" on February 28, 1994, and further indicating: "Information indicates within-named does not live at within-mentioned address."

On May 3, 1994, Respondent's counsel corresponded to the clerk of the court requesting service on the Petitioner, and filed an "Affidavit for Service of Process on the Secretary of the

Commonwealth" dated May 2, 1994. The Affidavit is signed and sworn to by Respondent's counsel, and indicates that the Petitioner "is a person whom the party seeking service, after exercising due diligence, has been unable to locate." The Affidavit lists the Petitioner's address as "338-G S. Whitting Street, #G31, Alexandria, Virginia 22304."

On May 26, 1994, the Secretary of the Commonwealth's "Certificate of Compliance" was filed with the court. The "Certificate of Compliance" is at the bottom of the "Affidavit for Service of Process on the Secretary of the Commonwealth." The "Certificate of Compliance" shows that "[o]n May 18, 1994, legal service in the above-styled case was made upon the Secretary of the Commonwealth, as statutory agent for

persons to be served in accordance with Section 8.01-329 of the Code of Virginia," and also showing that "[o]n May 20, 1994, papers described in the Affidavit were forwarded by first class mail, to the party designated to be served with process in the Affidavit."

On August 26, 1994, Respondent filed "Motion for Default Judgment," which was granted by Judge Bach on September 9, 1994. On September 12, 1994, "Proof of Service" was filed by the Sheriff of the City of Alexandria, showing the Petitioner as "NOT FOUND" on September 6, 1994, and further indicating "Information indicates within-named does not live at within-mentioned address."

By way of correspondence, counsel for Respondent was aware of the identity and location of counsel for Petitioner at all times relevant to this proceeding.

ARGUMENT

The Fourteenth Amendment of the United States Constitution guarantees that no state shall deprive any person of life, liberty or property without due process of the law. "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." In Re Gault, 387 U.S. 20 (1966). "The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." Dent v. West Virginia, 129 U.S. 114, 121 (1889).

"The fundamental requisite of due process of law is the opportunity to be heard." Mullane v. Cental Hanover Bank &

Trust Co., 339 U.S. 306, 314 (1950)(quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)). However, preliminary to the right to be heard is the step of notification. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314.

Because the opportunity to be heard is such an important element of the right of due process, the Court is cautious to preserve the right to be heard when providing alternative methods of service of process. A statute providing for substituted service of process must also contain provisions making notification of potential defendants as likely as possible. "An elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314 (1950)(citing Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604 (1914); Roller v. Holly, 176 U.S. 398 (1900)). There is no exact formula for what constitutes "notice reasonably calculated." However, "[t]he notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." Mullane, 339 U.S. at 314. Further, "[t]he criterion

is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals. " Id.

Symbolic attempts of notification, in the absence of any practical likelihood of notice, is impermissible. Instead, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id.

The Court has recognized that apprising all interested parties of the pendency of all actions is unlikely. However, the mere improbability of such notification does not excuse a plaintiff from attempting the means of notification most likely to be successful. "The

reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Id. (citations omitted).

1. Application of the Virginia statute constituted a denial of the Petitioner's due process rights because its due diligence requirement is insufficient and requires no documentation.

Pursuant to the Virginia statute, Respondent was required to certify that only one attempt at service on the Defendant was made. After one attempt, the Respondent was empowered to achieve service on the Secretary of the

Commonwealth upon the certification of a good faith attempt to locate the defendant.

There is no requirement of actual proof of due diligence. There is no requisite documentation supporting the plaintiff's certification of due diligence. Instead, one signature leads, unsupported by any additional proof, eliminates the requirement of personal service on a potential defendant. As a result, the Virginia statute is highly susceptible to the danger of abuse by an attorney willing to deceive the court for the chance at a substantial payday.

Attorneys are not immune from dishonest behavior, despite all professionally imposed ethical obligations.[1] Although consideration of

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[1] For instance, counsel for the Respondent, Jerry Phillips, recently pled guilty to contempt of court charges and was

the deceitful behavior of my colleagues of the bar brings no great pleasure, this Court has directed that "due regard for the practicalities and peculiarities of the case" must be given. Mullane, 339 U.S. at 314. Sadly, it is essential for the protection of a defendant's due process rights that dishonest behavior is anticipated, and that some safeguards be established to protect unwitting defendants from financially tragic results. Failure to do so would be both a denial of the fundamental weakness inherent in humanity, as well as a denial of the fundamental right of due process of the law.

However, the Virginia statute does not require any demonstration to the

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sentenced to thirty days in jail for his failure to report to the court a large cash payment he received from a convicted drug dealer.

court as to any specific acts taken by counsel for plaintiff. Nor is there a requirement that a plaintiff demonstrate to any degree whatsoever that the "missing" party has even left the Commonwealth.

2. The Virginia statute is a violation of the Defendant's due process rights because the statute contains no adequate provision for notifying the Defendant that substituted service has been achieved on the Secretary of the Commonwealth

Pursuant to Va. Code Ann. §8.01-329, the Secretary of the Commonwealth is appointed as an appropriate agent to accept service when a plaintiff is unable to locate the defendant. Assuming, arguendo, that the Virginia statute sufficiently allows such acceptance of substituted process, the statute unconstitutionally denied the due process rights of the Petitioner, because it

provided for no adequate means to inform the prospective defendant of the suit.

The Court has made clear that the method chosen to attempt to notify an unfound defendant of the pendency of an action must be reasonably calculated to apprise the defendant of the pendency of suit. "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Mullane, 339 U.S. at 315.

The Court has ruled that the statute must contain a reasonable provision for probable communication of substitute

service after the appropriate agent is indeed served. In Wuchter v. Pizzutti, 276 U.S. 13 (1928), the Supreme Court considered a New Jersey statute which provided for service of process on nonresidents[2] of the state in suits for injury by the negligent operation of automobiles on the highways.

The Wuchter court upheld the constitutionality of a statute providing for such substituted service on a nonresident of the state. However, following service of process on the appropriate state agent, the New Jersey statute contained no provision reasonably aimed at notifying the defendant that substituted service had been achieved,

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[2] Although Wuchter involved substituted service of process on nonresident users of a state highway, its holding is applicable to the instant case, which involves a resident of Virginia whom the Defendant was allegedly unable to locate.

and was, therefore, unconstitutional.[3] Wuchter, 276 U.S. 214. To be valid, the Court held, a statute must "contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the defendant who is sued." Wuchter, 276 U.S. at 18 (1928). The Wuchter court viewed the New Jersey statute with great suspicion. The Court reasoned that failing to take reasonable steps to notify a defendant subsequent to service of process would be susceptible to abuse. "A provision of law for service that leaves open such a clear opportunity for the commission of fraud or injustice is not a reasonable provision, and in this case supposed would certainly be

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[3] It is significant to note that the Court struck down the statute in Wuchter as being violative of the defendant's due process rights, despite the defendant's actual knowledge of the suit in question.

depriving a defendant of his property without due process of the law." Wuchter, 276 U.S. at 19 (citation omitted).

Pursuant to Virginia Code §8.01-329, upon receipt of service, the Secretary of the Commonwealth is required to mail notification of the lawsuit to the address listed as the defendant's last known address. The Secretary of the Commonwealth acted in full compliance with the statutory provision. However, attempted notification at the Petitioner's last known address was not reasonably calculated to apprise the Petitioner of the lawsuit. Instead, it is a guarantee that the defendant will not be apprised of the lawsuit. By virtue of the Respondent's certification that the Petitioner could not be found even in the exercise of due diligence, it

necessarily follows that the last-known address will not lead to notification of the Petitioner. Mailing notification of the lawsuit to any other residence in the world would have been more likely to so notify the Petitioner of the imminent litigation, since the only address at which the Secretary should know for certain the Defendant can not be found is the address to which the notification was sent.[4]

The Virginia statute, in so ordering the mailing of notice to the only address where a defendant would not be found, specifically provided for the least likely means of notifying the Petitioner of the pending lawsuit. One cannot help

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[4] Petitioner is excluding the possibility that such notification would reach a defendant by virtue of a forwarding order filed with the local post office. Such a forwarding order would be, without any uncertainty, revealed by the "duly diligent" search by the plaintiff.

but wonder whether the Supreme Court considered this very statute when writing that "mere gestures" of notification are not sufficient. Virtually any other method of service would provide a greater chance of notifying the Defendant than mailing to an incorrect address. For instance, publication in local newspapers or posting of notice on the steps of the local courthouse would be more likely to result in the notification of the Petitioner. Most egregious is the Respondent's failure to notify counsel for Petitioner that service had been achieved. Instead, counsel for Respondent, pursuant to the Virginia statute, provided for the <u>least</u> likely method of notification.

Because the Virginia statute has chosen a means of notice "substantially less likely to bring home notice than

other of the feasible and customary substitutes," Mullane, 339 U.S. at 315, the statute is not reasonable, and therefore not constitutional.

APPENDIX

JUDGMENT SOUGHT TO BE APPEALED
ORDER OF DEFAULT JUDGMENT ENTERED
ON SEPTEMBER 9, 1994

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

IRINA LEBEDEVA,	)	
	)	
Plaintiff	)	
	)	
v.	)	LAW NUMBER:
	)	L-130075
JORGE SOTO,	)	
	)	
Defendant	)	
	)	
	)	

ORDER OF DEFAULT JUDGMENT

This cause came before the Court on September 9, 1994, on the motion of the Plaintiff for the entry of a default judgment against the Defendant, and it appearing to the Court that the Defendant has failed to appear and failed to file any responsive pleadings; that the

Defendant was served by way of the Secretary of the Commonwealth, on May 26, 1994, certified that papers described in the Affidavit of Service of Process on the Secretary of the Commonwealth were forwarded by first class mail to the party to be designated to be served with the process in the Affidavit, and that this compliance having been filed since May 26, 1994, with no responsive pleading up to the present time having been filed by the Defendant.

For the reasons set forth in the Motion, and the attached Memorandum of Authorities in Support of the Motion for Default Judgment, and upon review of the papers filed herein, a default judgment is hereby entered against the Defendant and this matter is continued for an award

of damages upon presentation of evidence by the Plaintiff.

ENTERED this 9th day of September, 1994.

_____
Judge

I ask for this:

_____
Jerry M. Phillips
Counsel for Plaintiff

ORDER OF DECEMBER 15, 1995
DENYING PETITION FOR APPEAL
BY SUPREME COURT OF VIRGINIA

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of December, 1995.

Jorge Soto, Appellant,

against Record No. 951673
Circuit Court No. L-130075

Irina Lebedeva, Appellee,

From the Circuit Court for Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible

error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy

Teste:

David B. Beach, Clerk

By: Jennifer G. Earle
Deputy Clerk

ORDER OF JANUARY 19, 1996
DENYING PETITION FOR REHEARING
BY SUPREME COURT OF VIRGINIA

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 19th day of January, 1996.

Jorge Soto, Appellant,

against Record No. 951673
Circuit Court No. L-130075

Irina Lebedeva, Appellee,

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 15th day of December, 1995 and grant a rehearing

thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach
Clerk

On September 9, 1994, an Order of Default Judgment was entered by Judge Bach. (See Judgment Sought to be Reviewed, Appendix, p. 19). On June 16, 1995, Judge J. Howe Brown denied the defendant's motion to set aside the verdict, ruling:

> I deny the Motion to set aside the default judgment. I find that Judge Bach had before him everything necessary to make the decision. It was a question for the finder of fact whether there was an agreement or not an agreement and having heard the argument and seeing the evidence myself, I find that the evidence supports Judge Bach's decision that there was not an agreement and not a reasonable expectation of anything occurring, other than what did occur, so I deny it on that basis. Under the circumstances of this case, I find that the service was proper and constitutional and the motion to set aside the default judgment is denied.

On June 22, 1995, by way of letter from

Judge J. Howe Brown, the Defendant/Petitioner's Motion to Reconsider was denied. Judge Brown's decision holds, in pertinent part:

> The Motion to Reconsider is denied. The Court found that no fraud was perpetrated in connection with the default judgment. There was no fraud on the Court because the relevant papers were presented to Judge Bach for his review. There was no fraud on the opposing side because there was no agreement not to proceed with the default.

On December 15, 1995, the Supreme Court of Virginia denied Mr. Soto's Petition for Appeal. (See Order of December 15, appendix, p. 22). On January 19, 1996, the Supreme Court denied Mr. Soto's Petition for Rehearing. See Order of January 19, 1996, appendix, p. 24)

RAISING OF FEDERAL ISSUES

I. Motion to Set Aside Default Judgment

Petitioner first raised the federal issues relevant to this case in the Motion to Set Aside the Default Judgment, which was filed on May 16, 1995:

> Service of Process Pursuant to Virginia Code § 8.01-329 is unconstitutional
>
> Service in this case was made on Defendant Soto through the Secretary of the Commonwealth pursuant to Virginia Code §8.01-329. Such service unconstitutionally denied Mr. Soto notice reasonably calculated to apprise him of the pendency of the action against him.
>
> Virginia code §8.01-329 provides, in part:
>
> [Code reproduced]

The United States Supreme Court has set forth the constitutional requirements concerning service of process on a defendant:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted]. The notice must be of such nature as reasonably to convey the required information, [citation omitted], and it must afford a reasonable time for those interested to make their appearance, [citations omitted].

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, ___ L.Ed.2d ___ (1950). The United States Supreme Court has further held:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee

> might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, [citations omitted].

Id., 339 U.S. 306, 315, 70 S.Ct. 652, 657.

Citing Mullane, the Court of Appeals of Virginia recently reiterated constitutional due process requirements of notice of a pending action:

> An elementary requirement of due process in any proceeding is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citation omitted]. Such notice 'must afford a reasonable time for those interested to make their appearance.' [Citation omitted].

Eddine v. Eddine, __ Va. App. __, 406 S.E.2d 914, 916 (1991)(citing Mullane v. Central Hanover Bank & Trust Co.).

Mr. Soto has been denied due process. Notice to the Secretary of the Commonwealth is not constitutionally valid notice to a defendant, but is instead a "mere gesture" of notice. Indeed, §8.01-329 requires that before service can be made on the Secretary of the Commonwealth, the party seeking service must file an Affidavit that the person to be served is either a non-resident or, that after exercising due diligence, the party seeking service has been unable to locate the person to be served. Section 8.01-329 also requires that such Affidavit set forth the last known address of the person to be served. This is laughable, because service through the Secretary of the Commonwealth is essentially service on the defendant

by having the Secretary of the Commonwealth send him a letter at an address which both the plaintiff and the Secretary of the Commonwealth know is no longer the defendant's correct address.

Section 8.01-329.A states that "[s]ervice of process on the statutory agent shall have the same legal force and validity as if served within the Commonwealth personally upon the person for whom it is intended." However, the United States Constitution requires reasonable notice to the defendant, regardless of what Virginia Code §§ 8.01-312 and 8.01-329 may provide. What they provide, however, is that notice to a defendant is sufficient where the plaintiff serves the Secretary of the Commonwealth, and where the Secretary of

the Commonwealth then sends notification of the lawsuit to an address which everyone knows is no longer the Defendant's correct address. In other words, service through the Secretary of the Commonwealth pursuant to §§8.01-329 and 8.01-312 is not notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." It is instead service which is guaranteed not to apprise the defendant of the action. In fact, the only action which the Secretary takes to advise the defendant of the action pursuant to §§8.01-312 and 8.01-329 is to mail legal papers to the defendant at the address provided by the Plaintiff's attorney on the "Affidavit for Service of Process on the Secretary

of the Commonwealth." Unfortunately for the unsuspecting defendant, the address provided on that Affidavit is the very same address at which the Plaintiff's counsel could not find the defendant.

As such, the notice given to Defendant Soto, by service of process through the Secretary of the Commonwealth, is constitutionally insufficient. That service was reasonably calculated to cause the Notice of Motion for Judgement to be mailed to an address where he could no longer be found, but it was not reasonably calculated to apprise him of the pendency of the action against him. Therefore, the default judgment against Mr. Soto based on that service of process is void and should be set aside.

II. Petition for Appeal to the Supreme Court of Virginia

The federal issues which Petitioner requests that this Court review were also raised in a Petition for Appeal to the Supreme Court of Virginia, in the following form:

> The trial court erred in denying defendant Jorge Soto's motion to set aside plaintiff Irina Lebedeva's $300,000 default judgment against Mr. Soto, because the default judgment is void.

Virginia Code § 8.01-428 states that a court may set aside a judgment by default on the grounds that the judgment is void. The default judgment in this case is void because service of process on Mr. Soto pursuant to Va. Code § 8.01-329, in conjunction with Va. Code §§ 8.01-312 and 8.01-326.1, unconstitutionally denied Mr. Soto notice

reasonably calculated to apprise him of the pendency of the action against him.

Service of process on Mr. Soto was achieved through the Secretary of the Commonwealth pursuant to Virginia Code § 8.01-329. Virginia Code § 8.01-329 provides, in relevant part:

> **§ 8.01-329. Service of process or notice; service on secretary of commonwealth.** - A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made . . . on the Secretary of the commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.
>
> B. When service is to be made on the Secretary, the party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a non-resident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In

either case, such affidavit shall set forth the last known address of the person to be served.

Virginia Code § 8.01-312 provides:

> **§ 8.01-312. Effect of service on statutory agent; duties of such agent.**
>
> A. Service of process on the statutory agent shall have the same legal force and validity as if served within the Commonwealth personally upon the person for whom it is intended.
>
> Provided that such agent shall forthwith send by registered or certified mail, with return receipt requested, a copy of the process to the person named therein and for whom the statutory agent is receiving the process.
>
> Provided further that the statutory agent shall file an affidavit of compliance with this section with the papers in the action; this filing shall be made in the office of the court in which the action is pending.
>
> B. Unless otherwise provided by § 8.01-313 and subject to the provisions of § 8.01-316, the address for the mailing of the process required by this section shall be that as provided by the party seeking service.

Virginia Code § 8.01-326.1 provides:

> **§ 8.01-326.1. Service of process or notice on statutory agent; copy to be sent to defendant and certificate filed with court; effective date of service.** - Any statutory agent who has been served with process or notice shall forthwith mail a copy of such process or notice to the person or persons to be served at the last known post office address of such person and file a certificate of compliance with the papers in the action. Service of process or notice on a statutory agent shall be effective as of the date the certificate of compliance is filed with the clerk of the court in which the action or suit is pending.

The United States Supreme Court has set forth the constitutional requirements concerning service of process on a defendant such as Mr. Soto:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

> [Citations omitted]. The notice must be of such nature as reasonably to convey the required information, [citation omitted], and it must afford a reasonable time for those interested to make their appearance, [citations omitted].

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The United States Supreme Court has further held:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutionally validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, [citations omitted].

Id., 339 U.S. 306, 315.

Citing Mullane, the Court of Appeals of Virginia recently reiterated

constitutional due process requirements of notice of a pending action:

> An elementary requirement of due process in any proceeding is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citation omitted]. Such notice 'must afford a reasonable time for those interested to make their appearance.' [Citation omitted].

Eddine v. Eddine, 12 Va.App. 760, 406 S.E.2d 914, 916 (1991) (citing Mullane v. Central Hanover Bank & Trust Co.).

Clearly then, Mr. Soto was unconstitutionally denied due process - and the court therefore failed to obtain constitutionally valid personal jurisdiction over him - unless service of process on him in this case was

reasonably calculated to apprise him of the lawsuit against him. It was not.

Mr. Soto was denied notice of the lawsuit against him. The analysis is simple. The address of Mr. Soto which appears on the Motion for Judgment is "338-G. S. Whitting St., #G31, Alexandria, VA 22304." According to the "Proof of Service" form filed on March 7, 1994 by the Sheriff of the City of Alexandria, Mr. Soto was "NOT FOUND" at that address on February 28, 1994, and the Sheriff then determined that "[i]nformation indicates within-named does not live at within-mentioned address." [Record p. 5] So, at that point, everybody (the Sheriff, the court, and plaintiff's attorney) knew that Mr. Soto was <u>not</u> at "338-G. S. Whitting St.,

#G31, Alexandria, VA 22304." Regardless of that knowledge, on May 3, 1994 plaintiff's counsel filed an affidavit asking the Circuit Court to serve Mr. Soto through the Secretary of the Commonwealth. The only address for Mr. Soto provided on that affidavit was the invalid address of "338-G. S. Whitting St., #G31, Alexandria, VA 22304" where everybody already knew that Mr. Soto was not located. Pursuant to Virginia Code §§ 8.01-312 and 8.01-326.1, the Secretary then sent a copy of the process to that invalid address of "338-G. S. Whitting St., #G31, Alexandria, VA 22304" where everybody already knew that Mr. Soto was not located. That is all the notice - and all the due process - that Mr. Soto got in this case: he got "notice" only

by mailing of process to an address where everybody already knew that he was not located. That was it. That is not enough to pass constitutional muster.

That is not enough to pass constitutional muster because that was guaranteed not to apprise Mr. Soto of plaintiff Lebedeva's lawsuit against him. "Notice" in the form a one letter to one address where everybody knows the defendant is not located is no notice at all. Everybody knew that Mr. Soto would not be at "338-G. S. Whitting St., #G31, Alexandria, VA 22304" to receive the Secretary of the Commonwealth's letter, but that is where the plaintiff's counsel and the Secretary of the Commonwealth caused the letter to be mailed. Regardless of what any Virginia statutes

may provide, the United States Constitution guarantees Mr. Soto due process in the form of "notice reasonably calculated, under all the circumstances, to apprise [Mr. Soto] of the pendency of the action" against him. However, all he got in this case was a "mere gesture [which] is not due process." Therefore, the circuit court never properly obtained personal jurisdiction over Mr. Soto, and the default against him is void and should be set aside.

III. Petition for Rehearing

Finally, the federal issues for which the Petitioner desires review were raised in the Petitioner's Petition for Rehearing, filed in the Supreme Court of Virginia, on December 29, 1995.

The trial court erred in denying

defendant Jorge Soto's motion to set aside plaintiff Irina Lebedeva's $300,000 default judgment against Mr. Soto, because the default judgment is void.

Virginia Code § 8.01-428 states that a court may set aside a judgment by default on the grounds that the judgment is void. The default judgment in this case is void because service of process on Mr. Soto pursuant to Va. Code § 8.01-329, in conjunction with Va. Code §§ 8.01-312 and 8.01-326.1, unconstitutionally denied Mr. Soto notice reasonably calculated to apprise him of the pendency of the action against him.

Service of process on Mr. Soto was achieved through the Secretary of the Commonwealth pursuant to Virginia Code § 8.01-329. Virginia Code § 8.01-329 provides, in relevant part:

§ 8.01-329. Service of process

or notice; service on secretary of commonwealth. - A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made . . . on the Secretary of the commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

B. When service is to be made on the Secretary, the party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a non-resident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

Virginia Code § 8.01-312 provides:

§ 8.01-312. Effect of service on statutory agent; duties of such agent.

A. Service of process on the statutory agent shall have the same legal force and validity as if served within the Commonwealth personally upon the person for whom it is intended.

Provided that such agent shall forthwith send by registered or certified mail, with return receipt requested, a copy of the process to the person named therein and for whom the statutory agent is receiving the process.

Provided further that the statutory agent shall file an affidavit of compliance with this section with the papers in the action; this filing shall be made in the office of the court in which the action is pending.

B. Unless otherwise provided by § 8.01-313 and subject to the provisions of § 8.01-316, the address for the mailing of the process required by this section shall be that as provided by the party seeking service.

Virginia Code § 8.01-326.1 provides:

§ 8.01-326.1. Service of process or notice on statutory agent; copy to be sent to defendant and certificate filed with court; effective date of service. - Any statutory agent who has been served with process or notice shall forthwith mail a copy of such process or notice to the person or persons to be served at the last known post office address of such person and file a certificate of compliance with the papers in the action. Service of process or notice on a statutory

> agent shall be effective as of the date the certificate of compliance is filed with the clerk of the court in which the action or suit is pending.

The United States Supreme Court has set forth the constitutional requirements concerning service of process on a defendant such as Mr. Soto:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted]. The notice must be of such nature as reasonably to convey the required information, [citation omitted], and it must afford a reasonable time for those interested to make their appearance, [citations omitted].

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The United States Supreme Court has further held:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutionally validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, [citations omitted].

Id., 339 U.S. 306, 315.

Citing Mullane, the Court of Appeals of Virginia recently reiterated constitutional due process requirements of notice of a pending action:

> An elementary requirement of due process in any proceeding is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

> [Citation omitted]. Such notice 'must afford a reasonable time for those interested to make their appearance.' [Citation omitted].

Eddine v. Eddine, 12 Va.App. 760, 406 S.E.2d 914, 916 (1991) (citing Mullane v. Central Hanover Bank & Trust Co.).

Clearly then, Mr. Soto was unconstitutionally denied due process - and the court therefore failed to obtain constitutionally valid personal jurisdiction over him - unless service of process on him in this case was reasonably calculated to apprise him of the lawsuit against him. It was not.

Mr. Soto was denied notice of the lawsuit against him. The analysis is simple. The address of Mr. Soto which appears on the Motion for Judgment is "338-G. S. Whitting St., #G31,

Alexandria, VA 22304." According to the "Proof of Service" form filed on March 7, 1994 by the Sheriff of the City of Alexandria, Mr. Soto was "NOT FOUND" at that address on February 28, 1994, and the Sheriff then determined that "[i]nformation indicates within-named does not live at within-mentioned address." [Record p. 5] So, at that point, everybody (the Sheriff, the court, and plaintiff's attorney) knew that Mr. Soto was <u>not</u> at "338-G. S. Whitting St., #G31, Alexandria, VA 22304." Regardless of that knowledge, on May 3, 1994 plaintiff's counsel filed an affidavit asking the Circuit Court to serve Mr. Soto through the Secretary of the Commonwealth. The only address for Mr. Soto provided on that affidavit was the

invalid address of "338-G. S. Whitting St., #G31, Alexandria, VA 22304" where everybody already knew that Mr. Soto was not located. Pursuant to Virginia Code §§ 8.01-312 and 8.01-326.1, the Secretary then sent a copy of the process to that invalid address of "338-G. S. Whitting St., #G31, Alexandria, VA 22304" where everybody already knew that Mr. Soto was not located. That is all the notice - and all the due process - that Mr. Soto got in this case: he got "notice" only by mailing of process to an address where everybody already knew that he was not located. That was it. That is not enough to pass constitutional muster.

That is not enough to pass constitutional muster because that was guaranteed not to apprise Mr. Soto of

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[which] is not due process." Therefore, the circuit court never properly obtained personal jurisdiction over Mr. Soto, and the default against him is void and should be set aside.

Supreme Court, U.S.
FILED
JUL 10 1996
CLERK

(2)

No. 95-1989

In The

Supreme Court of the United States

October Term, 1995

JORGE SOTO,

Petitioner,

v.

IRENA LEBEDEVA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Virginia Long-Arm Statute is unconstitutional.

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STATEMENT OF THE CASE

Respondent points out to the Court the following perceived misstatements or omissions in the Petitioner's Statement of the Case. First, Petitioner has omitted from his Statement of Facts that there was a March 10, 1994, letter from Plaintiff's attorney to counsel for the insurance carrier of the Defendant. This March 10, 1994, letter explained that a phone call had been made to the Clerk's Office of the Fairfax County Circuit Court to ascertain that Service of Process on Mr. Soto was returned "Not Found." In addition to disclosing Mr. MacDonald how he may determine information in a Court file, the letter further stated, "I am asking for your agreement to accept service on behalf of Mr. Soto in order that we may proceed with the claim. I will allow you sufficient time to file your answer if you will agree to accept service." The second paragraph of that March 10, 1994, letter, also stated, "Please write and indicate your acceptance of service, or whether I will need to serve Mr. Soto through the Secretary of the Commonwealth."

Also, the Statement of Facts should include the argument presented to Judge Brown at the trial court level in which it was disclosed the Defendant had been in touch with his insurance company. The insurance company's adjuster been in contact with Mr. Soto. (See Record containing "Memorandum of Points and Authorities in Opposition to Motion to Set Aside Default Judgment", and argument presented before Circuit Court Judge Brown on June 16, 1995.)

Counsel for Soto was unwilling to disclose the whereabouts of Mr. Soto. This information was known to

counsel, but was not provided upon request because counsel felt that it was not proper to disclose this information. (See *Memorandum, supra,* Footnote Number 1, and transcript of June 16, 1995.)

ARGUMENT

Petitioner's argument is that because the Virginia Long-Arm Statute does not require actual proof of due diligence, that it violates constitutional standards. The Petitioner suggests in his brief that attorneys could use dishonest behavior, none of which is in the record of this case. The conduct of counsel was reviewed by two trial court judges, and the Supreme Court of Virginia. There is always a remedy for correcting a fraud committed upon the Court, in particular, in reference to a Default Judgement. Virginia Code Section 8.01-428, as amended, permits a court to set aside a judgment on default grounds if there has been fraud on the court, a void judgment, or proof of an accord and satisfaction. The trial court and the Virginia Supreme Court, after a review of the record, found that there was no such fraud on the court, as suggested by Petitioner.

Petitioner argues in his brief that he was not given the opportunity to be heard. This is incorrect as the record from the trial court below will substantiate. The Petitioner argues that the Virginia Long-Arm Statute is constitutionally invalid because he contends there is no notice which can reasonably be calculated to put the Defendant on notice. A review of the Virginia Long-Arm Statute, and the numerous Supreme Court of Virginia and

Fourth Circuit Court of Appeals cases interpreting it, all state otherwise.

When personal jurisdiction is sought pursuant to a Long-Arm Statute, a two-part analysis is generally employed: 1) whether asserting in personam jurisdiction over the defendant is contemplated by statute, and 2) if so, whether the assertion of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. *See e.g., English & Smith v. Metzger,* 901 F.2d 36, 38 (4th Cir. 1990); *Early v. Travel Leisure Concepts,* 669 F.Supp 130, 131 (E.D. Va. 1987); *Nan Ya Plastics v. DeSantis,* 377 S.E.2d 388, 391 (Va. 1989).

Under Virginia's Long-Arm Statute, personal jurisdiction may be asserted over a person as to a

> [c]lause of action arising from the person's: 1. Transacting any business in this Commonwealth; 2. Contracting to supply services or things in this Commonwealth; 3. Causing tortious injury by an act or omission in this Commonwealth; 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth . . .

Va. Code Ann. § 8.01-328.1(A) (Michie 1992).

In the present case, the Defendant, Mr. Soto, caused an automobile accident in Fairfax County, Virginia. This act clearly placed him within the jurisdiction of the Commonwealth of Virginia.

The issue in this case is one of notice. Jurisdiction does not attach to a defendant until process is served in a manner provided by statute. *Slaughter v. Commonwealth*, 284 S.E.2d 824, 826 (Va. 1981). In certain circumstances, service on a defendant can be made on the Secretary of the Commonwealth of Virginia, who is then the statutory agent of the person. *See* Va. Code Ann. § 8.01-329 (Michie 1992).

> [W]hen service is to be made on the Secretary, a party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

Va. Code Ann. § 8.01-329(B).

> [S]ervice of process or notice on the Secretary may be made by mail if such service otherwise meets the requirements of this section. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith mailed, by the Secretary to the person or persons to be served at the last known post-office address of such person, and a certificate of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in this action. Service of process or notice on the

> Secretary shall be effective on the date the certificate of compliance is filed with the court in which the action is pending.

Va. Code Ann. § 8.01-329(C).

Constitutionally, a statutory method of notice is adequate if it is reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank*, 339 U.S. 306, 318, 70 S.Ct. 652, 659 (1950). With regard to the last known address, this requirement is satisfied when process is sent to the address where the parties regularly correspond by mail and a party serving process could reasonably expect process would reach that person. *See Virginia Lime Co. v. Craigsville Distrib. Co.*, 670 F.2d 1366, 1368 (4th Cir. 1982).

In the instant case, the last known address to which one could reasonably expect where Mr. Soto could be reached, would be the address that he had given to the Department of Motor Vehicles in Virginia. Since Mr. Soto was a licensed Virginia driver, he was required to give the Virginia Department of Motor Vehicles notification of any address change.[1]

Additionally, sending notice to the address on one's license, as well as the address Mr. Soto gave the investigating police officer on the scene, could be reasonably calculated to reach the Defendant because if he has moved, one could reasonably expect that a responsible

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[1] Virginia Code Section 46.2-324 requires, "Whenever any person, after applying for or obtaining a driver's license shall move from the address shown in the application or on the license, he shall, within thirty days, notify the Department in writing of his change of address . . . "

person would not only advise the Department of Motor Vehicles of the change of address, but the Postmaster, with a forwarding address which would cause the letter to then be mailed to the new address.[2]

In the instant case, not only was the reasonably calculated method of notice given to Mr. Soto, but both the adjuster for the insurance company that was responsible for the liability of Mr. Soto, as well as his attorney, were provided notification of the filing of the Motion for Judgment. Furthermore, the attorney for Mr. Soto had been advised that if he was unwilling to accept service for Mr. Soto, then notice would be given by and through the Secretary of the Commonwealth by using the Virginia Long-Arm Statute. The March 10, 1994, letter addressed to this attorney forewarned that occurrence. Therefore, not only did the Defendant have Long-Arm statutory notice by way of mailing to his last known address, he was given other notice by correspondence and telephone to his attorney.[3]

Counsel for Petitioner delves outside of the record of this case in suggesting that there was some inappropriate conduct when he refers to possibilities and matters that

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[2] Petitioner believes that the Defendant can commit a tort in Virginia, leave without giving a forwarding address, or abscond, or "disappear" and thereby avoid service.

[3] Because the Virginia Long-Arm Statute does provide an adequate method for notification, there is no need to analyze whether the notice to the Defendant's attorney could be imputed to the Defendant.

were never before the trial court, and were not part of the record in this case.[4]

In summary, Petitioner had adequate remedies available to challenge the notification requirement. The Virginia Long-Arm Statute does not violate due process because it does contain a statutory method of notice that is reasonably calculated to reach interested parties.

CONCLUSION

The Virginia Supreme Court, after review of a Petition for a Writ of Error, and upon a Petition of Rehearing before that Court, appropriately denied the appeal of the Petitioner.

For the foregoing reasons, the Petitioner's Petition for Writ of Error should be denied.

Respectfully submitted,

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[4] Regrettably, Petitioner has referred to a matter totally outside the record. The irrelevant matter contained in Footnote Number 1 of the Petition for Writ of Certiorari, at Pages 9-10 of Petitioner's Brief, has no place in a Petition addressed to the Supreme Court of the United States.